
1909 K Street, NW
12th Floor
Washington, DC 20006-1157
TEL 202.661.2200
FAX 202.661.2299
www.ballardspahr.com

Charles D. Tobin
Direct: 202.661.2218
Fax: 202.661.2299
tobinc@ballardspahr.com

April 2, 2019

Via FedEx (tracking #786400096344) and email (bcarmack@ago.state.al.us)

Ms. Bettie J. Carmack
Assistant Attorney General
State of Alabama
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36104

Re: GateHouse Media reporter Lucille Sherman's Public Records Request

Dear Ms. Carmack:

We represent GateHouse Media, its Alabama newspapers *The Gadsden Times* and *The Tuscaloosa News*, and National Data Enterprise Reporter Lucille Sherman. We write concerning the denial of Ms. Sherman's request, which she made on behalf of GateHouse and these newspapers, for the following information about midwives licensed by the Alabama State Board of Midwifery (ASBM): first name, last name, license number, license status, license date, expiration date, address, city, state and zip. Both the denial you issued, and the "Public Records Request" form that you have told Ms. Sherman she must complete, are entirely unsupported by Alabama law. We write to ask that you immediately make *all* requested public records available to Ms. Sherman.

As you are aware, on March 21, 2019, Ms. Sherman made a public records request to the ASBM, pursuant to Alabama Code § 36-12-40, for the first name, last name, license number, license status, license date, expiration date, address, city, state and zip of the licensed midwives in the state. You denied Ms. Sherman's request for mailing addresses. You did not provide Ms. Sherman with any basis under Alabama law for that decision, merely telling her that she would need to "sue" for that information.

With respect to the remaining records requested, you instructed Ms. Sherman that she must complete ASBM's "Public Records Request" form, copy attached to this letter as Exhibit A. The form requires Ms. Sherman to agree to a number of conditions nowhere authorized under Alabama law:

- to agree to pay an unspecified amount of fees the ASBM may incur in its discretion to search for, review and redact the records;
- to waive jurisdictional and venue objections to being sued in the Circuit Court of Montgomery County if Ms. Sherman objects to paying any of these unspecified fees; and,
- to waive “all exemptions, including homestead and personal property exemptions” to satisfy any judgment against her for the production of these public records.

It is my understanding that you prepared this “Public Records Request” form. As you are aware, the form, and the prerequisites it seeks to impose for the public to access a handful of public records, violate Alabama’s Open Records Act. This response to Ms. Sherman’s request also ignores decades of published opinions from Alabama Attorney General’s Office – your office.

The mandate of the Alabama Open Records Act is clear:

“Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute.” Ala. Code § 36-12-40.

The Alabama Supreme Court has condemned precisely the sort of selective government decision-making that the record here demonstrates, admonishing that the Open Records Act is not “an avenue for public officials to pick and choose what they believe the public should be made aware of.” *Chambers v. Birmingham News Co.*, 552 So. 2d 854, 856-57 (Ala. 1989).

Alabama law provides no exceptions to public records requests for information related to midwives, as Ms. Sherman requested. Indeed, Alabama Code § 34-19-15 (e) requires that the ASBM “maintain an up-to-date list of every individual licensed to practice midwifery” and that the information “be available for public inspection during reasonable business hours.”

Moreover, while you told Ms. Sherman that she would need to “sue” to obtain midwives addresses, Alabama law contains no exemption for this category of information. Moreover, opinions from your office in public records matters repeatedly have found that addresses are not exempt from disclosure. *See* Op. Att’y Gen. Ala. No. 2001-107, 2001 Ala. AG LEXIS 31 (Mar. 1, 2001) (names and mailing addresses of applicants for the plumbers and gas fitters examination are public records and must be released); Op. Att’y Gen. Ala. No. 2001-137, 2001 Ala. AG LEXIS 58 (Mar. 30, 2001 (certain information on forms filed with the Department of Industrial Relations related to workers’ compensation insurance, including the name and mailing address of the insured, was a “public writing” subject to disclosure); Op. Att’y Gen. Ala. No. 2002-186, 2002 Ala. AG LEXIS 80 (Mar. 27, 2002) (addresses of members of the Peace Officers Annuity Fund were subject to disclosure). With just half a dozen midwives currently licensed by the ASBM, your arbitrary denial of Ms. Sherman’s request for this information is especially unjustifiable.

Also wholly unjustifiable under Alabama law is the “Public Records Request” form you are requiring Ms. Sherman to submit prior to making the records she requested available. Again, your office has consistently rejected the imposition of precisely the type of up-front, mandatory, unspecified fees for search, review, redaction and copying that the ASBM seeks to impose:

- The Attorney General has found that search fees may *only* be charged where the search will require “a substantial amount of an employee’s time.” See 184 Op. Att’y Gen. Ala. 27, 1981 Ala. AG LEXIS 18 (Aug. 25, 1981); 251 Op. Att’y Gen. Ala. 38, 1998 Ala. AG LEXIS 21 (June 12, 1998). The ASBM’s \$10.00 “initial research fee,” imposed mandatorily, before any search is conducted, and without any determination as to whether the request will require “a substantial amount of an employee’s time” is plainly contrary to the Attorney General’s Opinion.
- The Attorney General has also rejected the imposition of any fees on requesters for legal review of public records. See 251 Op. Att’y Gen. Ala 38, 1998 Ala. AG LEXIS 21 (June 12, 1998) (“Assessing legal fees against a citizen to enable the custodian to decide whether his or her records are public would seriously restrict access to public records” and holding that a public entity may not recover attorneys’ fees associated with review and production of public records); Op. Att’y Gen. Ala. No. 2008-073 (Apr. 21, 2008) (holding that a public body may not assess legal fees on the requesting party that are incurred as a result of a request for public records); Op. Att’y Gen. Ala. No. 2016-049 (Aug. 9, 2016) (“A public agency may not assess members of the public for legal expenses incurred in an effort to enable the custodian of records to determine whether records are subject to public disclosure.”). The ASBM’s uncapped \$50 per hour legal review fee clearly violates this well-established principle.
- The Attorney General has rejected the imposition of any set fees for copying or redactions. Indeed, the Attorney General has been clear that “[c]ustodians for public records *must provide free access to public records*. If copies of records are requested, when necessary due to budgetary constraints, a reasonable charge may be assessed based upon a recoupment of actual costs of providing copies or for retrieving the information. Such charges cannot be imposed to restrict public access.” 251 Op. Att’y Gen. Ala 38, 1998 Ala. AG LEXIS 21 (June 12, 1998); Op. Att’y Gen. Ala. No. 2016-049 (Aug. 9, 2016) (“As a general rule, members of the public are entitled to receive free access to public records.”). The uncapped \$10 per hour fee for potential redactions, as well as the set fees for copies, also plainly violate the Attorney General’s legal conclusions.

For these same reasons, the portions of the “Public Records Request” form requiring Ms. Sherman to waive venue and jurisdiction to allow your office to sue her over costs, and agree to pay all attorney’s fees, pre-judgment interest, and court costs – and to “waive all exemptions,

including homestead and personal property exemptions” – are wholly unlawful and unenforceable.¹

Alabama courts have consistently held that the Open Records Law is to be broadly construed in favor of disclosure. *Chambers v. Birmingham News Co.*, 552 So. 2d 854, 856 (Ala. 1989); *Allen v. Barksdale*, 32 So. 3d 1264, 1271 (Ala. 2009). The Alabama Supreme Court has recognized that the news media's ability to report on the affairs of government, through the disclosure of public records like those Ms. Sherman requested, is a primary purpose behind the Open Records Law. *See Stone v. Consol. Pub. Co.*, 404 So. 2d 678, 681 (Ala. 1981) (“... the news media are clearly appropriate vehicles by which citizens can learn about the activities and business conducted by our public officers.”) The community clearly has a right to examine the records of licensed midwives.

We fail to see why the ASBM, a public agency created explicitly to safeguard the interests of Alabama citizens seeking critical access to quality prenatal care – aided by the Alabama Attorney General’s Office – would withhold records that are clearly public, and the disclosure of which will serve the public interest. This is certainly not a matter that the ASBM should force the public and the media to litigate, or for the ASBM to risk an adverse award of GateHouse’s legal fees. *See, e.g., Advertiser Co. v. Auburn Univ.*, 579 So. 2d 645, 647 (Ala. Civ. App. 1991) (noting that a trial court is authorized to award attorney's fees to a prevailing plaintiff in a challenge brought under the Open Records statute).

We expect to receive, by the close of business on Friday, April 5, 2019, access to the small volume of records that Ms. Sherman requested, in full and without charge. We look forward to hearing from you.

Sincerely yours,

BALLARD SPAHR, LLP



Charles D. Tobin

cc: GateHouse Media
Alabama State Board of Midwifery (AlabamaStateBoardofMidwifery@gmail.com)

¹ Indeed, the provision seeking waiver of the homestead exemption does not even follow Alabama law’s requirements. *See* Ala. Code § 6-10-122 (1975).

EXHIBIT A

**ALABAMA STATE BOARD OF MIDWIFERY (ASBM)
PUBLIC RECORDS REQUEST**

Availability Statement: *The Alabama State Board of Midwifery (ASBM) acknowledges the public records access as provided by Code of Alabama §36-12-40(2013); and further defined under Code of Alabama §41-13-1(2013); however, in order to provide said public records and continue to maintain proper office operation, the ASBM stipulates that requests for all public records shall be made in writing and upon receipt of the written request; the ASBM further stipulates that the requested documents will be made available to the requester within twenty (20) working days of the request and payment of required fees, provided that requested records are not covered by known Right to Privacy Limitations or other sensitive document restrictions.*

I, _____, hereby request a copy of the below described records. I understand that an initial research fee of **\$10.00** shall be incurred as the result of any Public Records request.

I, _____, understand that any document requested that requires consultation with or review by legal counsel, before it is released, will require payment of an additional **\$50.00 per hour** fee.

I, _____, understand that any record that requires redaction in order to comply with privacy laws will incur an additional fee of **\$10.00 per hour**.

I, _____, understand **that the minimum fee** for a public records request shall be \$10.00 without attorney review and \$60.00 if attorney review is required for the requested record(s).

The established cost for copies of the records themselves shall be set at **50 cents per page** for 8X11 sized documents. Documents larger than 8X11 shall be copied at a charge of **\$1.00 per page**. Documents that are required to be copied in color are copied at a charge of **\$2.00 per page**. The fee to certify documents has been set at **\$20.00 per set** of documents certified.

All documents issued in response to a subpoena issued by a court of competent jurisdiction shall be at a base cost of **\$100.00** plus an additional fee of **\$1.00 per page**. Said documents shall include a certificate of authenticity.

I fully acknowledge and understand the terms of providing the requested public documents and hereby agree to be invoiced in full for any costs and fees incurred in response to a public records request. A failure by the requestor to pay the invoiced fee shall result in a small claims action being filed against the requestor and the requestor shall be liable for all attorney's fees, pre-judgment interest, and court costs. Said lawsuit will be filed in the Circuit Court of Montgomery County, Alabama and the requestor hereby waives any jurisdiction and venue objections to the lawsuit being filed in the Circuit Court of Montgomery County, Alabama. The requestor further agrees to waive all exemptions, including homestead and personal property exemptions, that may be claimed to preclude execution of a judgment for collection of any debt owed related to the production of public records.

Print name: _____

Signature: _____ Date: _____

Mailing address: _____

City, State, Zip Code: _____

Contact number: _____ Email: _____

Description of Records requested:

Reason records requested¹: _____

Is there a request that the records be certified with a certificate of authenticity document?
 _____ (yes or no).

¹ A governmental body may request the reason for a public records' request to determine if the request is for a legitimate or proper purpose. See Blankenship v. City of Hoover, 590 So. 2d 245 (Ala. 1991); See Person v. Ala. Dep't of Forensic Sciences, 721 So. 2d 203 (Ala. Civ. App. 1998) *rehearing denied*.

For Staff Only (Doc. 2210649):

Date request received: _____ **or Date Subpoena received:** _____

Payment Received Amount: _____

Date Payment Received: _____

Date records mailed: _____

Date request rejected, and reason request rejected: _____
